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AUG 26 2019

***Via Certified Mailing – Return Receipt***

August 20, 2019

Shawn Schiffer, President  
Foley Family Wines, Inc.  
DbA Foley Johnson  
200 Concourse Boulevard  
Santa Rosa, CA 95403-8210

Giovani Verdejo, Winemaker  
Managing Agent  
Foley Johnson  
8350 Saint Helena Highway  
Rutherford, CA 94573

**Re: Notice of Violations and Intent to File Suit Under the Federal Water Pollution  
Control Act (Clean Water Act)**

Dear Mr. Schiffer, Mr. Verdejo, and Managing Agent:

**NOTICE OF ALLEGED VIOLATIONS**

This Notice is provided on behalf of California River Watch (“River Watch”) in regard to violations of the Clean Water Act (“CWA” or “Act”), 33 U.S.C. § 1251 *et seq.*, that River Watch believes are occurring at Foley Johnson owned and/or operated by Foley Family Wines, Inc. (“Winery”) located at 8350 Saint Helena Highway in Rutherford California. Notice is being sent to you as the responsible owners, operators, and managers of the Winery and real property. This Notice addresses the violations of the CWA, including violation of the new terms of the General California Industrial Storm Water Permit, and the unlawful discharge of pollutants from the Winery indirectly into the Napa River, a navigable water of the United States impaired under CWA § 303(d) for sediment/siltation, nutrients, pathogens, and mercury.

CWA § 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant into waters of the United States unless such discharge is in compliance with various enumerated sections of the Act. Among other things, CWA § 301(a) prohibits discharges not authorized by, or in violation of, the terms of an individual National Pollutant Discharge Elimination System (“NPDES”) permit or a general NPDES permit issued pursuant to CWA § 402(p), 33 U.S.C. § 1342(p). CWA § 402(p), 33 U.S.C. § 1342(p) establishes a framework for regulating storm water discharges under

the NPDES program. States with approved NPDES permitting programs are authorized under this section to regulate storm water discharges through permits issued to dischargers and/or through the issuance of a single, statewide general permit applicable to all storm water dischargers. Pursuant to CWA § 402, the Administrator of the U.S. Environmental Protection Agency (“EPA”) has authorized California’s State Water Resources Control Board (“SWRCB”) to issue NPDES permits including general NPDES permits in California.

The SWRCB elected to issue a statewide general permit for industrial dischargers and issued NPDES Permit No. CAS000001, SWRCB Order No. 92-12-DWQ (the “General Permit”) on or about November 19, 1991, modified it on or about September 17, 1992, reissued it on or about April 17, 1997, and amended it significantly on April 1, 2014 (effective July 1, 2015), pursuant to CWA § 402(p). In order to discharge storm water lawfully in California, industrial dischargers must comply with the terms of the General Permit or have obtained an individual NPDES permit and are in compliance with its terms.

In addition to violations of the General Permit, this Notice alleges that pollutants are being discharged from a point source on the Winery site (a wastewater pond) to a water of the United States (the Napa River) without complying with the CWA.

CWA § 505(b) requires a citizen to give notice of the intent to file suit sixty (60) days prior to the initiation of a civil action under Section 505(a) of the Act. Notice must be given to the alleged violator, the EPA, and the state in which the violations occur. As required by the CWA, this Notice provides notice of the violations that have occurred and continue to occur at the Winery. Consequently, Foley Family Wines, Inc. and Foley Johnson (collectively, “Foley”) is placed on formal notice by River Watch that after the expiration of sixty (60) days from the date of this Notice, River Watch will be entitled to bring suit in the United States District Court against Foley for continuing violations of an effluent standard or limitation, NPDES permit condition or requirement, or Federal or State Order issued under the CWA (in particular, but not limited to, CWA § 301(a), § 402(p), and § 505(a)(1)), as well as the failure to comply with requirements set forth in the California Code of Federal Regulations and the San Francisco Bay Regional Water Quality Control Board (“RWQCB”) Water Quality Control Plan or “Basin Plan.”

The CWA requires that any notice regarding an alleged violation of an effluent standard or limitation or of an order with respect thereto shall include sufficient information to permit the recipient to identify the following:

**1. The Specific Standard, Limitation, or Order Alleged to Have Been Violated.**

To comply with this requirement, River Watch notices Foley of ongoing violations of the substantive and procedural requirements of CWA § 402(p) and violations of NPDES Permit No. CAS000001, SWRCB Order No. 92-12-DWQ as amended by Order No. 97-03-DWQ and Order No. 2014-0057-DWQ (the General Permit) relating to services and operations taking place at the Winery.

Foley, rather than seeking coverage under an individual NPDES permit, filed a Notice of Intent (“NOI”) agreeing to comply with the terms and conditions of the General Permit. The SWRCB approved the NOI on or about September 1, 2016 and Foley is assigned Waste Discharge

Identification (“WDID”) number 2 28I026778. River Watch, on the basis of eye-witness reports, records publicly available, and/or records in the possession and control of Foley, contends that in the continuing operations taking place at the Winery, conducted both indoors and outdoors where they are subject to rain events, Foley has failed to comply from Annual Reporting Year 2015-2016 to the present with the strict terms and conditions of the General Permit.

In addition to the alleged violations of the terms and conditions of the General Permit, River Watch alleges violations of the provisions of discharge prohibitions contained in the RWQCB’s Basin Plan, which are incorporated by reference as part of the compliance obligations imposed on Foley for the Winery under the General Permit (General Permit Section I.C.29).

In the event Foley believes that the discharges from the Winery’s wastewater pond are not storm water related, River Watch contends Foley remains in violation of the CWA for discharging pollutants to a water of the United States without complying with other sections of the Act (*see* CWA §§ 301 and 505). Except for non-storm water discharges (“NSWDs”) authorized in discharges of liquids or materials other than storm water, discharges either directly or indirectly to waters of the United States are prohibited unless authorized by another NPDES permit. River Watch contends Foley is not in possession of another applicable NPDES permit.

## **2. The Activity Alleged to Constitute a Violation.**

Full compliance with the mandates of the General Permit is not a mere statutory and regulatory exercise. The lands in and surrounding the Napa Valley Watershed produce a harvest of unparalleled bounty that draws acclaim worldwide. Failing to care for this critical environment as alleged in this Notice is a violation not only of law, but an abrogation of the trust we demand of Napa County landowners. Foley appears to support this, as it proclaims on its website – “All of our vineyards are farmed sustainably. Our goal is to preserve the local ecosystem and minimize our impact on the land. In addition to our proprietary farming program, we have helped rejuvenate and protect the Napa River bordering the eastern edge of our estate by removing non-native plants and reestablishing indigenous species. We have also have built bird and owl sanctuary houses in our vineyard for insect control. Beyond the beneficial effects sustainable farming has on the environment, it also results in superior grapes that more accurately reflect our terroir.” (<https://www.foleyjohnsonwines.com/About/Our-Vineyards>).

Having agreed to its terms, Foley has a continuing burden to demonstrate compliance with each and every applicable provision of the General Permit. River Watch alleges the following actions and inactions are violations of the General Permit:

### **a. Failure to Properly Sample and Monitor Storm Water Discharges**

Under the new General Permit, Foley is required to comply with all of the following:

- i. “Collect and analyze storm water samples from two (2) Qualifying Storm Events (“QSEs”) within the first half of each reporting year (July 1 to December 31), and two (2) QSEs within the second half of each reporting year (January 1 to June 30)” (General Permit Section XI.B.2 and SWPPP Section 5.6.1 (“*Sampling Schedule*”).

River Watch, following review of the SWRCB's SMARTs reporting database, contends Foley failed to comply with this requirement by failing to sample and analyze for any of the required four (4) samples during the 2016-2017, 2017-2018, and 2018-2019 Annual Reporting Years.<sup>1</sup> Foley confirms in its Annual Reports that no samples were taken (or "visual observations" conducted) during the 2017-2018 and 2018-2019 Annual Reporting Years (*see* "Question Information" #2, #3, and #9).

- ii. "Analyze all collected samples for the following parameters: "(a) Total suspended solids (TSS) and oil and grease (O&G); (b) pH ...; (c) Additional parameters identified by Foley on a facility-specific basis that serve as indicators of the presence of all industrial pollutants identified in the pollutant source assessment ..." (General Permit Section XI.B.6.a.-c.).

River Watch, in the absence of the full complement of Annual Reports and "Analytical Reports" of the stormwater samples required to be reported, cannot determine the extent of the storm water pollution being discharged from the Winery. The Analytical Reports should provide sampling for Oil and Grease, Total Suspended Solids, and pH; the "List of Identified Pollutants within the Impaired Watershed"; zinc and copper resulting from transportation activities at the Winery; and critically the "additional parameters identified by Foley on a facility-specific basis that serve as indicators of the presence of industrial pollutant identified in the pollutant source assessment ..." (General Permit Section XI.B.6.c; SWPPP Section 2.2.1).

b. Failure to Comply with Receiving Water Limitations and Discharge Prohibitions

The General Permit requires Foley to ensure that industrial storm water discharges and authorized NSWDS do not: (a) cause or contribute to an exceedance of any applicable water quality standards in the Napa River including its tributaries (General Permit Section I.E.37, VI.A.); (b) adversely affect human health or the environment (General Permit Section VI.B.); and, (c) do not contain pollutants in quantities that threaten to cause pollution or a public nuisance (General Permit Section III.C., VI.C.). Foley provides no evidence of complete compliance with these requirements for the Winery's transportation-related areas and wastewater pond.

c. Failure to Comply with Total Maximum Daily Loads (TMDLs) Requirements

As the Napa River and its tributaries are CWA § 303(d) listed as impaired, when Foley applied for NOI coverage under the new General Permit, it was required to submit data and/or information, prepared by a Qualified Industrial Storm Water Practitioner, demonstrating that Foley: (1) eliminated all exposure to storm water of the pollutants for which the water body is impaired, has documented the procedures taken to prevent exposure onsite, and has retained such

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<sup>1</sup> Note that Foley's required Annual Report for Annual Reporting Year 2016-2017 is not available on the SMARTS website, in violation of General Permit Section XVI and as required by the Winery's Storm Water Pollution Prevention Plan ("SWPPP") Section 1.9. The SMARTS website does include a 2016-2017 Annual Report for a facility located at 10300 Chalk Hill Road in Healdsburg, California (SMARTS Attachment ID# 1970288 and 1970287). In addition, a review of the Foley Johnson website suggests the winery began operation in 2012, requiring compliance with the new General Permit effective July 1, 2015 (*see* <https://www.foleyjohnsonwines.com/About/About-Foley-Johnson>).

documentation with the SWPPP at the Winery; (2) the pollutant for which the water body is impaired is not present at the Winery; or (3) the discharge of any listed pollutant will not cause or contribute to an exceedance of a water quality standard (General Permit Section VII.B.). River Watch could find no documentation from Foley demonstrating compliance with these requirements.

d. Failure to Prepare and Implement an Adequate SWPPP

i. Assessment of Potential Pollutant Sources

The current SWPPP on SMARTS for the Winery (dated 8/1/16) fails to include a sufficient narrative assessment of all areas of industrial activity with potential industrial pollutant sources: (i) likely to be present in industrial storm water discharges and authorized NSWDS; (ii) the degree to which the pollutants associated with those materials may be exposed to, and mobilized by contact with, storm water; and; (iii) the identification of the industrial pollutants related to the receiving waters with CWA § 303(d) listed impairments or approved TMDLs that may be causing or contributing to an exceedance of a water quality standard in the receiving waters (General Permit Section X.G.2.i, iv, and ix).

Although Foley has identified certain facility-specific activities known to create pollution taking place at the Winery, it has failed to identify additional parameters associated with these facility-specific industrial pollutants. For example, Foley identifies transportation activities but has not tested for copper or zinc which are known pollutants from tires, brake pads, fuels and lubricants. Foley has also failed to identify or test for these transportation-related pollutants in its parking lots (identified in SWPPP Section 2.2.1), vehicle storage area(s), or other transportation surfaces.

ii. Site Map

The Winery's Site Map, included in SWPPP Appendix A, is inadequate in that it fails to clarify the inconsistency identified above, and fails to provide the detailed list of information required by the General Permit. Specifically, the Site Map does not include: (a) sufficient notes, legends, and other data as appropriate to ensure the map is clear, legible and understandable; (b) the actual site-facility boundary, storm water drainage areas within the site-facility boundary, and portions of any drainage area impacted by discharges from surrounding areas; (c) the flow direction of each drainage area, on-facility surface water bodies, areas of soil erosion, and location of nearby water bodies (such as rivers, lakes, wetlands, etc.) or municipal storm drain inlets that may receive the Winery's industrial storm water discharges and authorized NSWDS; all the locations of storm water collection and conveyance systems, associated discharge locations, and direction of flow; (d) the locations and descriptions of structural control measures such as catch basins, berms, detention ponds, secondary containment, oil/water separators, diversion barriers; (e) the identification of all impervious areas of the Winery including paved areas such as roads, parking lots, and vehicle storage areas. (General Permit Section X.E.).

**3. The Person or Persons Responsible for the Alleged Violation.**

The entity responsible for the alleged violations is Foley Johnson, owned and operated by Foley Family Wines, Inc.

**4. The Location of the Alleged Violation.**

The location of the various violations is the permanent address of the Winery at 8350 Saint Helena Highway in Rutherford, California, including the waters of the Napa River and its tributaries – waters of the United States.

**5. The Date or Dates of Violation or a Reasonable Range of Dates During Which the Alleged Activity Occurred.**

The range of dates covered by this Notice is from July 1, 2015 to August 20, 2019. River Watch will from time to time update this Notice to include all violations which occur after the range of dates covered by this Notice. Some of the violations are continuous in nature, therefore each day constitutes a violation.

**6. The Full Name, Address, and Telephone Number of the Person Giving Notice.**

The entity giving this Notice is California River Watch, an Internal Revenue Code § 501(c)(3) nonprofit, public benefit corporation organized under the laws of the State of California, with headquarters located in Sebastopol, California. River Watch's mailing address is 290 South Main Street, #817, Sebastopol, California 95472. River Watch is dedicated to protecting, enhancing and helping to restore surface water and groundwaters of California including coastal waters, rivers, creeks, streams, wetlands, vernal pools, aquifers and associated environs, biota, flora and fauna, and to educating the public concerning environmental issues associated with these environs.

River Watch may be contacted via email: [US@ncriverwatch.org](mailto:US@ncriverwatch.org), or through its attorneys. River Watch has retained legal counsel with respect to the issues set forth in this Notice. All communications should be directed to:

David Weinsoff, Esq.  
Law Office of David Weinsoff  
138 Ridgeway Avenue  
Fairfax, CA 94930  
Tel. 415-460-9760  
Email: [david@weinsofflaw.com](mailto:david@weinsofflaw.com)

**REMEDIAL MEASURES REQUESTED**

River Watch believes that at a minimum implementing the requirements of the General Permit outlined in Section 2 of this Notice is necessary in order to bring Foley into compliance with the CWA and reduce the biological impacts from its non-compliance upon public health and the environment.

## CONCLUSION

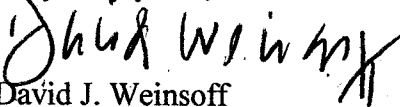
The violations set forth in this Notice effect the health and enjoyment of members of River Watch who reside and recreate in the affected community. Members of River Watch may use the affected watershed for recreation, sports, fishing, swimming, hiking, photography, nature walks and/or the like. Their health, use, and enjoyment of this natural resource is specifically impaired by Foley's violations of the CWA as alleged in this Notice.

The General Permit, in the very first "Standard Condition," states that "Dischargers shall comply with all standard conditions in this General Permit. Permit noncompliance constitutes a violation of the Clean Water Act and the [California] Water Code and is grounds for enforcement action and/or removal from General Permit coverage" (General Permit Section XXI.A). The gravity of ensuring that the Annual Reports submitted to the State of California are complete and accurate is highlighted by the General Permit requirement that the person signing and certifying the document certifies that "to the best of my knowledge and belief, the information submitted is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations" (General Permit Section XXI.L).

CWA §§ 505(a)(1) and 505(f) provide for citizen enforcement actions against any "person," including individuals, corporations, or partnerships, for violations of NPDES permit requirements and for unpermitted discharges of pollutants. 33 U.S.C. §§ 1365(a)(1) and (f), 33 U.S.C. §1362(5). An action for injunctive relief under the CWA is authorized by 33 U.S.C. §1365(a). Violators of the Act are also subject to an assessment of civil penalties of up to \$54,833.00 per day/per-violation pursuant to Sections 309(d) and 505 of the Act, 33 U.S.C. §§ 1319(d), 1365. *See also* 40 C.F.R. §§ 19.1-19.4. River Watch believes this Notice sufficiently states grounds for filing suit in federal court under the "citizen suit" provisions of CWA to obtain the relief provided for under the law.

The CWA specifically provides a **60-day** "notice period" to promote resolution of disputes. River Watch encourages Foley to contact counsel for River Watch within **20 days** after receipt of this Notice to discuss the allegations detailed in this Notice. In the absence of productive discussions to resolve this dispute, or receipt of information demonstrating Foley is in compliance with the strict terms and conditions of the General Permit, River Watch will have cause to file a citizen's suit under CWA § 505(a) when the 60-day notice period ends.

Very truly yours,

  
David J. Weinsoff

DW:lm

### **Service List**

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